

Case No: 13-55631

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8 UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

9

10 CHESTER M. HUNT, LYNDA) Case No: 13-55631
11 SUSAN HUNT,)
12 Plaintiff/Appellant,) D.C. No: EDCV-12-02171 TJH (OPx)
13)
14 vs.) BRIEF OF APPELLANT
15)
16)
17 U.S. BANK, NATIONAL)
18 ASSOCIATION, AS TRUSTEE FOR)
19 THE HOLDERS OF MASTR)
20 ADJUSTABLE RATE MORTGAGES)
TRUST 2007-3; BANK OF)
21 AMERICA, N.A. SUCCESSOR BY)
MERGER TO BAC HOME LOANS)
22 SERVICING, LP FKA)
COUNTRYWIDE HOME LOANS)
23 SERVICING LP; DOES 1 THROUGH)
10, INCLUSIVE)
24)
25)
26 Defendants/Appellee.)
27)
28

Case No: 13-55631

1 Plaintiffs/Appellants CHESTER M. HUNT, LYNDA SUSAN HUNT
2 respectfully appeal from the Judgment and Order Granting Defendant's Motion
3 to dismiss Plaintiff/Appellants complaint without leave to amend.
4

5 Date: October 22, 2013
6

7 /s/ Joseph La Costa
8

9 Joseph La Costa
10 Attorney for CHESTER M. HUNT, LYNDA SUSAN HUNT
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<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
--------------------------	-------------

1	Table of Authorities	ii
2	I. <u>JURISDICTIONAL STATEMENT</u>	1
3	a. Jurisdiction of the Federal District Court, Southern	
4	District.	1
5	b. Jurisdiction of the 9 th Circuit Court of Appeals.	2
6	c. Timeliness of the Appeal.	2
7	d. The finality of the order appealed.	2
8	II. <u>STATEMENT OF THE ISSUES PRESENTED FOR</u>	
9	<u>REVIEW</u>	5
10	III. <u>STATEMENT OF THE CASE</u>	5
11	a. Nature of the case.	5
12	b. Course of proceedings.	5
13	c. Disposition at the Federal District Court below.	6
14	IV. <u>STATEMENT OF FACTS RELEVANT TO THE ISSUES</u>	
15	<u>SUBMITTED FOR REVIEW</u>	6
16	V. <u>SUMMARY OF THE ARGUMENT</u>	7
17	VI. <u>ARGUMENT.</u>	7
18	a. Contentions and reasons for them with citations to the	
19	authorities and parts of the record relied upon.	7
20	b. Standard of Review.	8
21	VII. <u>CONCLUSION</u>	8
22	<u>STATEMENT OF RELATED CASES</u>	9
23	<u>CERTIFICATE OF COMPLIANCE</u>	11
24	<u>CERTIFICATE OF SERVICE</u>	12

TABLE OF AUTHORITIES **PAGE****CASES**

AE ex rel. Hernandez v. County of Tulare 666 F.3d 631 (9th Cir. 2012)	8
Bagdasarian Prods., LLC v. Twentieth Century Fox Film Corp. 673 F.3d 1267 (9th Cir. 2012)	3
Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center, Inc. 490 F.3d 718 (9th Cir. 2007)	3
Coopers & Lybrand v. Livesay 437 U.S. 463 (1978)	2
Elliott v. White Mountain Apache Tribal Court 566 F.3d 842 (9th Cir. 2009)	3
Firestone Tire & Rubber Co. v. Risjord 449 U.S. 368 (1981)	2
Glaski v. Bank of America F064556, 2013 WL 4037310 (Cal. App. 5th Dist. 2013)	7, 8
Hotel & Motel Ass'n of Oakland v. City of Oakland 344 F.3d 959 (9th Cir. 2003)	4

TABLE OF AUTHORITIES **PAGE**

1	Jewel v. Nat'l Sec. Agency 673 F.3d 902 (9th Cir. 2011)	8
3		
4	Klestadt & Winters, LLP v. Cangelosi 672 F.3d 809 (9th Cir. 2012) (bankruptcy)	3
6		
7	Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1 (1983)	3
9		
10	Stone v. Heckler 722 F.2d 464 (9th Cir. 1983)	3
12		
13	Sierra Forest Legacy v. Sherman 646 F.3d 1161 (9th Cir. 2011)	3
15		
16	Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co. 117 F.3d 432 (9th Cir. 1997)	3
18		
19	Slimick v. Silva (In re Slimick) 928 F.2d 304 (9th Cir. 1990)	4
21		
22	Lovell v. Chandler 303 F.3d 1039 (9th Cir. 2002)	4.
24		
25	Montes v. United States 37 F.3d 1347 (9th Cir. 1994)	4
27		
28		

TABLE OF AUTHORITIES **PAGE**

1	Oki Semiconductor Co. v. Wells Fargo Bank	
2	298 F.3d 768 (9th Cir. 2002)	8
3		
4	Scott v. Eversole Mortuary	
5	522 F.2d 1110 (9th Cir. 1975)	4
6		
7	Smith v. Pacific Props. & Dev. Corp.	
8	358 F.3d 1097 (9th Cir. 2004)	8
9		
10	Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.	
11	368 F.3d 1053 (9th Cir. 2004)	8
12		

OTHER AUTHORITIES

14	Article III of the United States Constitution	1
15	12 U.S.C. § 2605	1
16	15 U.S.C. §1692	1
17	28 U.S.C. §1331	1
18	28 U.S. C. §1367	1
19	28 U.S.C. §1332	1
20	28 U.S.C. §1391(b)	1
21	28 U.S.C. §1343	1
22	28 U.S.C. §1291	2
23	28 U.S.C. §2107	2
24	28 U.S.C. §2201	1
25	28 U.S.C. §2202	1
26	42 U.S.C. §1983	1
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1 **I. JURISDICTIONAL STATEMENT**

2

3 **a. Jurisdiction of the Federal District Court, Southern District.**

4 The Federal District Court had original jurisdiction over the claims in
5 this action based on 28 U.S.C. §§ 1331, 1343, 2201, 2202, 12 U.S.C. § 2605,
6 15 U.S.C. § 1692, 42 U.S.C. § 1983 which confer original jurisdiction on
7 federal district courts in suits to address the deprivation of rights secured by
8 federal law.

9 The Federal District Court also had supplemental jurisdiction over the
10 pendant state law claims because they form a part of the same case or
11 controversy under Article III of the United States Constitution, pursuant to 28
12 U.S. C. § 1367.

13 The Federal District Court had original jurisdiction over the claims in
14 this action based on 28 U.S.C. §1332, which confers original jurisdiction on
15 federal district courts in suits between diverse citizens that involve an amount
16 in controversy in excess of \$75,000.00

17 The unlawful conduct, illegal practices, and acts complained of and
18 alleged in the Plaintiff/Appellant's complaint were all committed in the Central
19 District of California and involved real property located in the Central District
20 of California. Therefore, venue properly lied in the Central District, pursuant
21 to 28 U.S.C. § 1391(b).

22 Plaintiffs/Appellants, Chester and Lynda Hunt ("HUNT" hereafter) are
23 now, and at all times mentioned herein were, individuals residing in the State
24 of California, County of Riverside, City of Riverside. At all relevant times to
25 this action, Plaintiffs/Appellants have owned that real property which is the
26 subject matter of these proceedings which is located within the jurisdiction of
27 the Central District of California.

1 At all relevant times Defendant/Appellee U.S. Bank, National
2 Association is a National Association organized and existing under the laws of
3 the State of Minnesota.

4 At all relevant times Defendant/Appellee Bank of America, National
5 Association is a National Association organized and existing under the laws of
6 the State of North Carolina.

7 Hereafter, Defendants will be collectively referred to as "Defendants"
8 and/or "USBNA."

9

10 **b. Jurisdiction of the 9th Circuit Court of Appeals.**

11 The 9th Circuit Court of Appeals has jurisdiction of this matter pursuant
12 to 28 U.S.C. § 1291.

13

14 **c. Timeliness of the Appeal.**

15 Pursuant to 28 U.S.C. § 2107 no appeal shall bring any judgment, order
16 or decree in an action, suit or proceeding of a civil nature before a court of
17 appeals for review unless notice of appeal is filed, within thirty days after the
18 entry of such judgment, order or decree.

19 The Judgment that is the subject of this appeal was entered on April 3,
20 2013.

21 The Plaintiff/Appellant filed their Notice of Appeal on April 16, 2013,
22 thirteen days later.

23 Since the Notice of Appeal was filed within 30 days of the entry of
24 judgment, this appeal is timely.

25

26 **d. The finality of the order appealed.**

27 Under 28 U.S.C. § 1291, the court of appeals has jurisdiction over "all
28 final decisions of the district courts . . . except where a direct review may be

had in the Supreme Court.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981).

Section 1291 has been interpreted to confer appellate jurisdiction over a district court decision that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (internal quotation marks and citation omitted); see also *Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809, 813 (9th Cir. 2012) (bankruptcy).

A district court decision may also be considered final where its result is that the appellant is “effectively out of court.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983) (citations omitted); see also *Bagdasarian Prods., LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267, 1270-71 (9th Cir. 2012) (recognizing that “courts will in limited circumstances permit immediate appeal if the stay order effectively puts the plaintiff ‘out of court’—creating a substantial possibility there will be no further proceedings in the federal forum, because a parallel proceeding might either moot the action or become res judicata on the operative question”); *Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center, Inc.*, 490 F.3d 718, 723-24 (9th Cir. 2007) (stating that “Moses H. Cone applies whenever there is a possibility that proceedings in another court could moot a suit or an issue, even if there is no guarantee that they will do so” and holding that “lengthy and indefinite stays place a plaintiff effectively out of court.”).

The finality rule is to be given a “practical rather than a technical construction.” *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983) (quotation marks and citation omitted); see also *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011) (applying practical construction to the finality requirement to determine if remand order was final); *Elliott v. White Mountain*

Apache Tribal Court, 566 F.3d 842, 845 (9th Cir. 2009) (“[T]he requirement of finality is to be given a practical rather than a technical construction.” (quotation marks and citation omitted)).

A district court order is final only when it is clear that the judge intended it to be final. See *Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997). “Evidence of intent consists of the [o]rder’s content and the judge’s and parties[’] conduct.” *Slimick v. Silva (In re Slimick)*, 928 F.2d 304, 308 (9th Cir. 1990) (citations omitted); see also *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 964 (9th Cir. 2003) (concluding, based on the procedural history leading up to order, that the district court intended order to be final even though some of the claims were dismissed without prejudice). The focus is on the intended effect of the order, not the terminology used by the district court. See *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994) (holding that order dismissing “action” rather than “complaint” is not final if court’s words and actions indicate an intent to grant plaintiff leave to amend). If it is clear that the district court intended to dispose of all the claims before it, abandoned claims will not compromise the finality of the judgment. See *Lovell v. Chandler*, 303 F.3d 1039, 1049 (9th Cir. 2002).

Where the district court expressly denies leave to amend, the order is final and appealable. See *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1112 (9th Cir. 1975).

The Judgment and Order Granting Defendant’s Motion to dismiss Plaintiffs/Appellants complaint without leave to amend, served to terminate and close the pending cause of action, and permitted Plaintiffs/Appellants no further right to pursue their case.

Accordingly, the order appealed from is final.

1 **II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.**

2

3 The issues presented on appeal are relative to the Order granting the
4 Defendant/Appellee's Motion to Dismiss the Plaintiffs/Appellant's Complaint
5 without leave to amend. The Plaintiffs/Appellants assert that the subject order
6 was improper and an abuse of the Court's discretion, and therefore subject to
7 review and reversal by this Court on Appeal.

8

9 **III. STATEMENT OF THE CASE.**

10

11 **a. Nature of the case.**

12 The Plaintiffs/Appellants have filed this action relative to their personal
13 residence in the City of Riverside, California in the County of Riverside, and
14 the claims asserted by the Defendant/Appellee's. HUNT asserted that USBNA
15 was a third party stranger to the loan transaction that was secured by the
16 subject property, and that the actions taken by USBNA relative to the asserted
17 interest in the loan transaction were non-existent. Given the lack of any
18 pecuniary or contractual interest in the loan transaction, HUNT sought to
19 establish the relative interests of USBNA in the Note and Deed of Trust that
20 secures the property through their claim for Declaratory Relief; recover
21 damages for moneys wrongfully obtained by USBNA and obtain an
22 accounting of the moneys improperly obtained by USBNA.

23

24 **b. Course of proceedings.**

25 HUNT filed this pending action on December 11, 2012 after prior
26 proceedings were terminated with the Federal District Court for the Central
27 District. (See Excerpts of Record, Volume 1, Number 1, Documents #1.)

1 On January 18, 2013, USBNA filed a Motion to Dismiss with the Court.
 2 (See Excerpts of Record Volume 1, Number 2, Documents #13.)

3 On February 1, 2013 HUNT filed an Opposition to the Motion to
 4 Dismiss. (See Excerpts of Record, Volume 2, Number 12, Document #19.)

5 On February 11, 2013 USBNA filed a Reply to HUNT's opposition to
 6 Defendant's Motion to Dismiss. (See Excerpts of Record Volume 2, Number
 7 13, Document #21.)

9 **c. Disposition at the Federal District Court below.**

10 On April 3, 2013 the District Court issued and entered its Order on
 11 Motion to Dismiss. Leave to amend was not granted. (See Excerpts of Record
 12 Volume 2, Number 14, Documents #22.)

13 On April 3, 2013 the Clerk filed its Judgment dismissing the case, and
 14 said order was entered on April 3, 2013. (See Excerpts of Record, Volume 2,
 15 Number 15, Document #23.)

16 On April 16, 2013 HUNT filed their Notice of Appeal to the Ninth
 17 Circuit Court of Appeal. (See Excerpts of Record Volume 2, Number 16,
 18 Document #24.)

20 **IV. STATEMENT OF FACTS RELEVANT TO THE ISSUES**

21 **SUBMITTED FOR REVIEW.**

23 Because a reasonable analysis of the Plaintiff's complaint, as set forth in
 24 HUNT's opposition to the Defendant's Motion to Dismiss shows that further
 25 amendment can save the Plaintiff's claims, as well as the recent decision by the
 26 California Court of Appeal in *Glaski v. Bank of America*, F064556, 2013 WL
 27 4037310 (Cal. App. 5th Dist. 2013) setting forth a borrowers standing to
 28 question the method, timeliness of and legality of the securitization process,

1 the Plaintiff's complaint could be saved by amendment and therefore HUNT
2 files this appeal seeking *de novo* review of the dismissal of their case.
3

4 **V. SUMMARY OF THE ARGUMENT.**

5
6 HUNT has filed the present appeal because the Federal District Court
7 abused its discretion in dismissing the pending case without permitting HUNT
8 leave to amend, especially in light of recent case law.

9 Since the District Court has dismissed the case without leave to amend,
10 on appeal this Court reviews the Motion to Dismiss filed by USBNA in a *de*
11 *novo* manner.
12

13 **VI. ARGUMENT.**

14
15 **a. Contentions and reasons for them with citations to the**
16 **authorities and parts of the record relied upon.**

17 The Court below issued an Order granting USBNA's motion to dismiss
18 without leave to amend.

19 HUNT contends their complaint and causes of action CAN be saved by
20 further amendment. In support thereof HUNT contends that upon *de novo*
21 review of the order of dismissal together with review of HUNT's complaint
22 and HUNT's opposition to the USBNA Motion to Dismiss this Court will
23 conclude that HUNT's complaint can be saved by further amendment, and
24 therefore the Court below erred in denying HUNT the opportunity to amend
25 the complaint.

26 While the Defendant takes great issue with HUNT's arguments relative
27 to the failed securitization of the Note and Deed of Trust the California Court
28 of Appeals has recently thrown out much of the authority cited by the

1 Defendant and relied upon by the lower Court, and concluded that a borrower
 2 can in fact challenge the improper and untimely attempt to deposit an asset into
 3 a REMIC trust after the trust was closed to accept such an asset. (See: *Glaski v.*
 4 *Bank of America*, F064556, 2013 WL 4037310 (Cal. App. 5th Dist. 2013))
 5

6 **b. Standard of Review**

7 A dismissal without leave to amend is reviewed *de novo*. See *Smith v.*
 8 *Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (noting
 9 underlying legal determinations require *de novo* review); *Oki Semiconductor*
 10 *Co. v. Wells Fargo Bank*, 298 F.3d 768, 772 (9th Cir. 2002).

11 Dismissal without leave to amend is improper unless it is clear, upon *de*
 12 *novo* review that the complaint could not be saved by any amendment. See *AE*
 13 *ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012);
 14 *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 903 n.3 (9th Cir. 2011); *Thinket Ink*
 15 *Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).
 16

17 **VII. CONCLUSION.**

18
 19 HUNT files this appeal and respectfully asserts that upon *de novo* review
 20 of this case that the Court below erred in dismissing his cause of action without
 21 leave to amend. HUNT therefore requests that her appeal be granted, the Order
 22 of the District Court be rescinded and set aside, and that this Court order that
 23 HUNT be allowed to file a further amended Complaint.
 24

25 Date: October 22, 2013
 26

27 /s/ Joseph La Costa
 28

Joseph La Costa, Attorney for Plaintiffs/Appellants

1
2 **STATEMENT OF RELATED CASES**
3

4 Pursuant to Ninth Circuit Rule 28-2.6, counsel for Plaintiff/Appellant
5 hereby notifies the Court of the following related cases:

- 6 1) Federal District Court, Central District: ED CV 12-02171-TJH OPx
7 2) Federal District Court, Central District, ED CV 12-01075-VAP OPx
8

9
10
11 Respectfully submitted.
12

13 Dated this: October 22, 2013
14

15 /s/ Joseph La Costa
16

17 -----
18 Joseph La Costa
19 Attorney for Plaintiffs and Appellants
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(s)

Joseph La Costa

Attorney for

Plaintiff/Appellant

Dated:

10/22/2013

9th Circuit Case Number(s) 13-55631

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